U.S. Department of Labor

Board of Alien Labor Certification Appeals
1111 20th Street, N.W.
Washington, D.C. 20036

Date: February 4, 2000
BALCA Case No.: 1998-INA-133
CO Case No.: P96-TX-12442

***In the Matter of*:**

EL RIO GRANDE,
Employer,

on behalf of

GALO M. NAREA,
Alien.

Appearances:
Sarah A. Dahl
New York, NY
For Employer and Alien

Jinny Chun
Washington, DC
For the Certifying Officer

Anna Marie Gallagher
Washington, DC
Deborah Notkin
New York, NY
Leon Rosen
New York, NY
For Amicus Curiae, American Immigration Law Foundation, American Immigration Lawyers Association

Certifying Officer: Delores Dehaan
New York, NY

Before: Burke, Holmes, Huddleston, Jarvis, Neusner, Vittone, and Wood
Administrative Law Judges

JOHN M. VITTONE
Chief Administrative Law Judge

DECISION AND ORDER

This matter arises from El Rio Grande's ("Employer") request for review pursuant to 20 C.F.R. § 656.26 of the United States Department of Labor Certifying Officer's ("CO") denial of an application for permanent alien labor certification for the position of "Specialty Cook, Mexican,"

classified under the Dictionary of Occupational Titles as "Cook, Specialty, Foreign Foods," DOT Code 313.361-030.[1] (AF 12). The issues for review are whether, for purposes of determining the prevailing wage under section 656.40, the job opportunity is in an occupation which is subject to the McNamara-O'Hara Service Contract Act ("SCA"), and if so, whether the prevailing wage was reasonably determined using the "slotting" procedure of 29 C.F.R. § 4.51(c). Because three member panels have ruled inconsistently on the first issue,[2] the application in this case has been reviewed by the Board *en banc*. We hold that the CO did not err in finding that the position offered by Employer is covered by SCA, but remand the case for an explanation of how the wage determination was made or for a revised wage determination.

STATEMENT OF THE CASE

On April 4, 1997, Employer filed an application for alien labor certification on behalf of Alien for the position of "Specialty Cook, Mexican" with the New York State Department of Labor ("NYDOL") (AF 8-12). Employer's application included a request for reduction in recruitment. On April 17, 1997, the NYDOL denied the reduction request on the ground that the wage offered was below the prevailing wage. (AF 14-15). In the letter denying Employer's request, the NYDOL advised Employer that the prevailing wage for the job offered was $17.43 per hour pursuant to McNamara-O'Hara Service Contract Act ("SCA"), 41 U.S.C. 351 *et seq.*, 20 C.F.R. Part 4. (AF 17-19). According to the NYDOL, the job offer is covered by the SCA and thus subject to Wage Determination No. 94-2375 for Cook II, effective May 9, 1996. *Id*. Employer declined to amend the offered wage of $440 per week[3] (*i.e.*, $11 an hour), arguing that the SCA wage rate was not intended to cover foreign specialty cooks.

On July 14, 1997, the CO issued a Notice of Finding ("NOF"), reiterating the applicability of the SCA wage rate to Employer's job opening and stating her intent to deny labor certification. (AF 22-23). The CO found that pursuant to section 656.20(c)(2), Employer's wage offer must equal or exceed the prevailing wage. (AF 22). Further, according to the CO, section 656.40(a)(1) requires that if the job opportunity is in an occupation and a geographic area for which a wage determination is made under the SCA, the SCA's determination prevails. *Id.* The CO advised Employer that it could rebut the NOF by increasing the wage offered to the prevailing wage. *Id*.

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[1]This application was submitted by Employer pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20. We base our decision on the record upon which the CO denied certification and Employer's request for review, as contained in the appeal file ("AF"), and any written arguments of the parties and *amicus curiae*. 20 C.F.R. 656.27(c).

[2]*See* n.7, *infra*.

[3]*See* AF 115.

On August 4, 1997, in response to a Freedom of Information Act ("FOIA") request submitted by Employer's counsel for information about how the wage assessment was derived, the U.S. Department of Labor, Employment Standards Administration ("ESA") sent Employer a copy of the job description for Cook II as listed in the *SCA Directory of Occupations* (4th ed. Jan. 1993), and a copy of the *May 1995 Occupational Compensation Survey for the New York, New York Metropolitan Area* (BLS Bulletin 3030-19). (AF 30-64). In a letter dated August 4, 1997, accompanying the documentation, the Chief, Branch of Service Contract Wage Determinations, ESA, Wage and Hour Division, stated that the wage rate for Cook II in the New York metropolitan area had been derived through a procedure called "slotting," pursuant to 29 C.F.R. § 4.51(c). (AF 64).

Employer submitted a rebuttal dated September 2, 1997, arguing, *inter alia*, that the job offer is for a Mexican Specialty Cook ("Specialty Cook, Foreign Foods") and not for a Cook II, and therefore not subject to the SCA wage determination. (AF 68). Employer's counsel argued that:

> There is no lawful reason for the U.S. Department of Labor to suddenly and without notice increase the prevailing wage to a level almost twice that which the same Department had for several years insisted was prevailing. Assuredly the average wages paid by employers in the New York area did not virtually double in a month's time, nor has a recent survey been conducted with regard either to the weighted average wage determined to be prevailing under 20 C.F.R. or the median wage that represents the starting point for an SCA wage determination under 29 C.F.R.

(AF 68). Employer also contended that, even if the offered job is subject to the SCA, the slotting procedure was inappropriately used to calculate the wage. (AF 67). Employer argued that a Mexican specialty cook in New York City is not the type of position where a wage survey would result in insufficient data. *Id.*

The CO denied certification in a Final Determination ("FD") dated September 25, 1997. (AF 69-70). According to the CO, Employer failed to meet the prevailing wage and had failed to submit evidence that the SCA wage determination was incorrect. *Id*.

Employer requested review of the CO's denial of certification on October 24, 1997. The American Immigration Lawyers Association ("AILA") was granted status by the Board to appear as *amicus curiae*.

DISCUSSION

I. Jurisdiction

Preliminarily, we raise *sua sponte* the issue of whether the Board of Alien Labor Certification Appeals has jurisdiction to review SCA wage determinations made in the context of applications for alien labor certification under 20 C.F.R. Part 656.

Amicus notes that SCA employers "in the non-labor certification context are provided a complaint procedure which allows them to contest SCA wage determinations," and argues that a procedure allowing an opportunity to challenge a SCA wage determination in a labor certification case should exist. Indeed, in the typical SCA wage determination context, any interested party affected by a wage determination may request review and reconsideration by the Administrator, and then further review by the Administrative Review Board ("ARB"). 29 C.F.R. §§ 4.56 and 8.2. The Administrator's authority to reconsider under 29 C.F.R. § 4.56, however, is limited to "wage determinations issued under Section 2(a) of the [Service Contract] Act" – that is, cases involving federal contracts in excess of $2500. Moreover, the ARB's jurisdiction depends on the Administrator's review and reconsideration. Thus, we concur with *amicus* that the review procedure for SCA wage determinations for federal contracts does not contemplate review of SCA wage determinations made for purposes of alien labor certification.

The labor certification regulations require employers to offer a wage that equals or exceeds the prevailing wage. 20 C.F.R. § 656.20(c)(2). Section 656.21(e) provides that "[t]he local office shall calculate, to the extent of its expertise using wage information available to it, the prevailing wage for the job opportunity pursuant to Sec. 656.40 and shall put its finding into writing." Section 656.40(a)(1) provides, *inter alia*, that

> (1) If the job opportunity is in an occupation which is subject to a wage determination in the area under the Davis-Bacon Act, 40 U.S.C. 276a et seq., 29 CFR part 1, or the McNamara-O'Hara Service Contract Act, 41 U.S.C. 351 et seq., 29 CFR part 4, the prevailing wage shall be at the rate required under the statutory determination. Certifying Officers shall request the assistance of the DOL Employment Standards Administration wage specialists if they need assistance in making this determination.

(emphasis added). We recognize that in practice COs – who are employees of the Employment and Training Administration -- do not actually calculate SCA wage determinations; rather, they defer to the Wage and Hour Division of the Employment Standards Administration. The regulatory language, however, places the ultimate responsibility for the SCA wage determination in a labor certification context on the CO, and only places Wage and Hour Division in an advisory role. Moreover, the regulatory framework does not provide employers in labor certification proceedings the right to challenge SCA wage determinations through the Wage and Hour appeal procedure at 29 C.F.R.§§ 4.55, 4.56 and 8.2.[4] Accordingly, we conclude that the Board of Alien Labor Certification appeals has jurisdiction, indeed the obligation, to review challenges to SCA wage determinations made by COs pursuant to 20 C.F.R. § 656.40(a)(1).

II. Standard of Review

[4]*Compare* 20 C.F.R. § 655.731(d)(2)(stating appeals procedure for challenge of prevailing wage determinations made in enforcement actions under the Labor Condition Application regulations); *Exotic Granite and Marble, Inc. v. USDOL*, 1998-JSA-1 (ALJ Feb. 12, 1998).

In reviewing SCA wage determinations made by COs pursuant to 20 C.F.R. § 656.40(a)(1), it is appropriate to look to the decisions of the ARB, and its predecessors – the Board of Service Contract Appeals and the Secretary of Labor's office – for guidance given their expertise on the subject. The ARB and its predecessors, and well as the federal courts, afford great deference to the Wage and Hour Administrator's specific methodology in making wage determinations under the SCA. A recent decision of the ARB in *Dept. of the Army*, ARB Nos. 98-120, 98-121 and 98-122 (ARB Dec. 22, 1999), crystallizes the standard of review it employs when reviewing SCA wage determinations. We quote extensively from that decision because it reflects closely the standard of review BALCA will employ in reviewing SCA wage determinations made by COs:

> ...We review the Administrator's rulings to determine whether they are consistent with the statute and regulations, and are a reasonable exercise of the discretion delegated to the Administrator. . . .

Id. @ 13 (citations omitted).[5]

> The Administrator's discretion under the Service Contract Act is perhaps at its broadest when the Administrator is issuing prevailing wage schedules. . . . Like its sister statute, the Davis-Bacon Act, nowhere does the SCA prescribe a specific methodology to be used by the Secretary or her designee, the Administrator, when determining the prevailing wage. Perhaps the clearest indicator of the very great deference owed to the Secretary and the Administrator when determining prevailing wage rates is the clear body of case law holding that the substantive correctness of wage determinations is not subject to judicial review. *United States v. Binghamton Construction Co.*, 347 U.S. 171, 177 (1954) (under the Davis-Bacon Act); *Commonwealth of Virginia v. Marshall*, 599 F.2d 588, 592 (4th Cir. 1979) (under the Davis-Bacon Act); *AFGE v. Donovan*, 25 Wage & Hour Cas. (BNA) 500, 1982 WL 2167 at *2 (D.D.C. 1982), *aff'd* 694 F.2d 280 (D.C. Cir. 1982) (table) (under the Service Contract Act). Judicial review "is limited to due process claims and claims of noncompliance with statutory directives or applicable regulations." *Commonwealth of Virginia* at 592 (citing *Califano v. Sanders*, 430 U.S. 99, 109 (1977)).

Id. @ 22.

> The regulatory scheme under which SCA wage determinations are developed directs the Administrator to exercise discretion when determining the specific methodology to be employed in calculating particular wage rates. The [ARB] "will upset a decision of the Administrator only when the Administrator fails to articulate a reasonable basis for the decision, taking into account the applicable law and the facts of the case." *Court Security Officers [of Austin, Texas]*, ARB Case No. 98-001 (Sept. 23, 1998), slip op. at 4, *aff'd sub nom. Richison v. Herman*, No. W-97-CA-385 (W.D. Tex. Feb. 1, 1999); *see also D. B. Clark III*, slip op. at 6. Thus, the central question on appeal . . . is not whether a different methodology from the one chosen by the

[5]Citations are to the decision found in the USDOL/OALJ Reporter at www.oalj.dol.gov/public/dba/decsn/98_120.htm.

> Administrator might have been *more* reasonable, but simply whether the Administrator's chosen methodology is consistent with the law and the facts before us. *See COBRO Corp.*, ARB Case No. 97-104 (July 30, 1999), slip op. at 23. The quality of the evidence in the record can be a significant consideration in determining whether to uphold the Administrator; as the Deputy Secretary noted in *Tri-States Service Co.*, an analogous case involving a challenge to SCA wage determination rates, "the basic issue to be decided is whether the wage information supplied by Petitioner represents more accurate and probative evidence of the prevailing wages in the locality than the data and methods utilized by the Wage and Hour Division." Case No. 85-SCA-WD-12, Dep. Sec. Dec. (Sept. 18, 1990), slip op. at 5.

Id. @ 27.

> ...Although the [ARB] is "delegated authority and assigned responsibility to act for the Secretary of Labor in issuing final agency decisions" in matters arising under the Service Contract Act (Secretary's Order 2-96, 61 Fed. Reg. 19982 (1996)), it is the Administrator, not the [ARB], who has primary responsibility for implementing and enforcing the SCA. To that end, the [ARB] and its predecessor agencies extend broad deference to the Administrator's interpretations of the Act and its implementing regulations, so long as the Administrator's policies and determinations are legally sound and otherwise reasonable. . . . Thus, our inquiry on review is focused simply on whether the Administrator's decision reflects a *reasonable* interpretation of the statute and regulations, not whether we believe it to be the best policy choice.
>
> Although the basic concept behind the Service Contract Act – *i.e.*, that employees on Federal service contracts should not be paid less than the locally-prevailing wage and fringe benefit rates – is straightforward, the implementation of the statute is complex and raises many difficult questions. Fundamental concepts of "locality" and "prevailing" are critical threshold issues in wage determination matters, but they are followed by a host of equally challenging problems such as competing methodologies for collecting and analyzing wage data. In many of these situations requiring interpretation of the statute or its regulations, there is no single "right" or "obvious" answer to these questions. Instead, the Administrator must choose from a variety of options while trying to reconcile several interests: the statutory mandate that local labor standards be protected; the need to establish predictable and enforceable policies; the goal of promoting stability in the Federal procurement system; and the obligation to be an effective steward of the resources provided by Congress for implementing the statute, using them as efficiently as possible. It is not an easy job.

Id. @ 29.

> The Administrator ordinarily should consider all major arguments raised by each of the parties in a request for review and reconsideration, and address specifically the evidence presented. This is particularly true when it is evident (as in this case) that each of the Petitioners had invested significant time and effort to develop and articulate its own position.

Id. @ n.8.

We hold that these general principles are applicable to BALCA review of SCA wage determinations made by COs pursuant to section 656.40(a)(1).

III. Burdens of CO and Employer

Another important decision to consider when reviewing appeals of SCA wage determinations made by COs under section 656.40(a)(1) is *John Lehne & Sons*, 1989-INA-267 and 313 (May 1, 1992)(*en banc*). In *Lehne*, BALCA, *en banc*, set out the burdens of the CO and the Employer when a dispute arises over the proper wage determination and classification of a job under the Davis-Bacon Act. That discussion is applicable to cases involving SCA wage determinations.

The Board held in *Lehne* that "[t]he burden of persuasion rests with the Employer seeking to challenge the CO's prevailing wage determination. However, placement of this burden on the Employer presumes that the Employer knows the source and basis for the CO's determination." In addition, the Board held that, where a wage determination is in dispute, a CO must "provide a copy of the relevant portions of his or her source for the prevailing wage determination with the NOF" because "[i]t is unreasonable to require that an employer rebut a wage rate of ambiguous or unknown origin, or one which is not easily accessible." In *Lehne*, the Board also held that "if an employer challenges the CO's Davis-Bacon wage determination in rebuttal, then the CO must provide a reasonable explanation of how the prevailing wage was determined from the Davis-Bacon schedule, and why it was appropriate under the circumstances."

In regard to the employer's burden, the Board noted the general rule that "[a]n employer seeking to challenge a prevailing wage determination . . . bears the burden of establishing both that the CO's determination is in error and that the employer's wage offer is at or above the correct prevailing wage. *PPX Enterprises, Inc.*, [19]88-INA-25 (May 31, 1989)(*en banc*)."[6] The Board held that where the occupation "is covered by the Davis-Bacon schedule, the prevailing wage rate must be derived from that schedule and cannot be assessed from an independent wage survey conducted by the Employer." Nonetheless, the Board held that an employer "is not precluded from conducting a survey which may indicate an error in the classification used by the CO in the Davis-Bacon wage assessment." Finally, the Board held that, in addition to demonstrating that the CO's wage determination is in error, the Employer is required to establish that its wage offer is at or above the correct prevailing wage.

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[6]According to Harry L. Sheinfeld, Counsel for Litigation, Division of Employment and Training Legal Services, Office of the Solicitor, U.S. Department of Labor, writing in an unofficial capacity for Practicing Law Institute, the Occupational Employment Statistics implementation described in GAL [General Administration Letter] 2-98 will modify the requirement of BALCA case law that an employer both demonstrate a deficiency in the SESA wage survey and demonstrate the correctness of its own survey. Under the GAL 2-98 process, "[a]n employer who submits a published or private survey that meets the criteria in GAL 2-98 will be allowed to use that survey for the application [*for a non-DBA/SCA covered occupation*, without having to establish that the SESA survey is invalid]." Sheinfeld, PREVAILING WAGE DETERMINATIONS UNDER GAL 2-98, 1080 PLI/Corp 9 at n.3 (AILA 1998). "GALs are the administrative issuances by which the Employment and Training Administration of the Department of Labor provides formal regulatory interpretation and other guidance to its Regional Offices." *Id*. at n.3.

IV. Whether the Position of "Cook, Foreign Speciality Food" Is Covered By the SCA Occupation of "Cook II"?

It is beyond dispute that food service work constitutes an occupation covered by the Service Contract Act.[7] *See* 29 C.F.R. § 4.130 (listing examples of covered contracts, including "cafeteria and food service"). Thus, the precise issue in the case *sub judice* is not whether cooking is an occupation covered by the SCA, but whether the CO's placement of a cook, specialty, foreign foods, into the subclassification of "Cook II" under the *Service Contract Act, Directory of Occupations* was reasonable.[8] The *Directory of Occupations* contains two "cook" job classifications:[9]

> 07041 COOK I
>
> Independently performs moderately difficult tasks in preparing small quantities of quickly prepared food such as steaks, chops, cutlets, hamburgers, eggs, salads and other similar items. Excludes workers who exercise general supervision over kitchen activities.
>
> 07042 COOK II
>
> Prepares in large quantities, by various methods of cooking, meat, poultry, fish, vegetables, etc. Seasons and cooks all cuts of various meats, fish and poultry. Boils, steams or fries vegetables. Makes gravies, soups, sauces, roasts, meat pies, fricassees, casseroles, and stews. Excludes food service supervisors and head cooks who exercise general supervision over kitchen activities.

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[7]We decline *amicus*'s invitation to revisit the holding of *Standard Dry Wall*, 1988-INA-99 (May 24, 1988) (*en banc*), that the issue under § 656.40(a)(1) is not whether the **employer** is subject to the provisions of the Davis-Bacon Act, but whether the **occupation** is subject to a wage determination under the Davis-Bacon Act. *See also Brad Bartholomay, Jr., Landscape Design and Consultation*, 1988-INA-332 (May 31, 1989) (*en banc*). Moreover, we find that the holding of *Standard Dry Wall* and *Bartholomay* that, for labor certification prevailing wage purposes, it is the occupation rather than the existence of a federal contract that is important in determining whether the DBA wage applies, is likewise applicable to occupations covered by the SCA.

[8]Three member panels of this Board have ruled inconsistently on the question of whether the prevailing wage for a cook, speciality, foreign foods, should be determined based on the SCA prevailing wage for a "Cook II." In *Benihana*, 1998-INA-115 (Feb. 25, 1999), the panel held that DOT and SCA definitions of duties need not be identical, citing the "substantially comparable" standard of section 656.40(b), and agreeing with the CO that Employer's job description clearly reflected that the duties involve the preparation of most of the food items cited under the SCA Cook II description. In contrast, in *Bon Vivant Restaurant*, 1998-INA-295 (Apr. 14, 1999), the panel concluded that the employer had pointed out substantial differences between the duties of a Cook II and a cook specializing in foreign foods, and therefore the the SCA wage rate did not apply. *See also Sofia's Ristorante Italiano*, 1998-INA-238 (May 21, 1999) (decided by *Bon Vivant* panel, holding that duties of Cook II and those of a Cook, Special Foreign Food are not sufficiently comparable to apply the SCA prevailing wage rate, and citing *Bon Vivant* for the proposition that the CO cannot change a job description to fit Cook II).

[9]The SCA *Directory of Occupations* also includes categories for "Fast Food Worker" and "Food Service Worker (Cafeteria Worker).

The CO's contention is that the position of cooks, speciality, foreign foods, fits into the SCA Cook II occupational category. Both Employer and *Amicus* argue that the use of the words "[p]repares in large quantities" of the Cook II definition indicates volume cooking for large numbers of people, whereas a speciality cook prepares food to order for individuals.

The CO argues that the *SCA Directory of Occupations* uses standardized classifications – definitions designed to be general in order to include as many jobs into that occupation category as possible. In response to Employer's specific arguments, the CO notes that the "quantities" language of the SCA Cook II definition could be interpreted in two ways – the amount of food prepared each time -- or the total amount of food prepared by the cook over a certain length of time. The first interpretation, the CO argues, would be unreasonable because the SCA occupational definition should not be read as being created to exclude cooks other than banquet, cafeteria or mess hall cooks. The CO contends that the SCA classifications for cooks are based on task difficulties, and that the main difference between Cook I and Cook II is the level of experience involved, Cook I requiring more experience to be able to engage in "moderately difficult tasks" involving "quickly prepared foods." The CO also argues that Employer is seeking to carve out a separate category of cooks, contrary to the SCA regulations, which do not sanction efforts to artificially spilt or subdivide classifications, citing 29 C.F.R. § 4.152(c).

Employer's position on the matter of classification may be self-defeating. Employer's focus on the preparation of individual meals arguably could result in a classification of its position into the "Cook I" category, which would undoubtedly mean that the SCA prevailing wage determination would be even higher. *See, e.g., Industrial Maintenance Service, Inc.,* BSCA Case No. 92-22 (Apr. 5, 1993) (Cook I wage of $8.27 per hour and Cook II wage of $7.36). In any case, we conclude that the SCA definition of Cook II is intentionally broad in coverage, and is broad enough to cover cooks specializing in foreign foods, even though one aspect of the definition arguably does not fit. We also conclude that it is appropriate for SCA classifications to sweep broadly given the nature of their mission to provide the basis for wage determinations for the multitude of occupations that are covered by the SCA. BALCA has never required Dictionary of Occupational Titles to precisely fit an employer's job description, *Trilectron Industries, Inc.*, 1990-INA-188 (Dec. 19, 1991), and likewise we conclude that applying SCA classifications when making labor certification prevailing wage determinations is inherently an inexact science that requires an exercise of discretion on the part of COs. What is sought is a reasonably good fit -- not necessarily a perfect fit. When reviewing a classification, this Board will primarily be looking at whether the CO has made a reasonable classification to a SCA occupational definition. In regard to the labor certification application *sub judice*, we find that it was reasonable for the CO to have classified a cook specializing in foreign foods to the SCA Cook II definition.

V. Whether the Wage Determination Was Reasonably Made

In the instant case, the CO, through the Wage and Hour Division, used a "slotting" technique authorized by 29 C.F.R. § 4.51(c) to determine the prevailing wage for a "Cook II" in the New York, New York Metropolitan area. Slotting is provided for in 29 CFR § 4.51(c) as a means of arriving at a salary when there is insufficient data to make an accurate wage determination for those workers. The

process of slotting involves examining data from related occupations with a comparable skill level to arrive at a wage for the occupation for which the data is insufficient.

Employer argues that slotting was inappropriate in the instant proceeding because it is only to be used when there is insufficient data, and "[i]t seems inconceivable that a wage survey would, could, or might result in insufficient data to determine the wage for foreign specialty cooks in the New York City area," pointing out that until March of 1997, the Department of Labor had been able to determine a prevailing wage for cooks based on existing data. (AF 109-110). *See* 29 C.F.R. § 4.51(c) (slotting available because "[i]n some instances, a wage survey for a particular locality may result in insufficient data for one or more job classifications....").

We find that the Department of Labor may properly use slotting to determine a prevailing wage for a SCA-covered occupation for purposes of alien labor certification,[10] but that if slotting is used it must be used in a reasonable and fair manner. We hold that where slotting is used for a SCA wage determination, and Employer challenges the SCA wage determination, the CO must provide information on why slotting was used, which positions were compared, and why the comparison was reasonable. Once the CO does so, however, the ultimate burden of proof remains on an employer challenging a SCA prevailing wage determination to establish that the CO's wage determination is in error, and that it its wage offer is at or above the correct prevailing wage.

The instant case illustrates why fundamental fairness demands a disclosure of such information because, at least on its face, the SCA wage determination appears to have been inflated. The information provided by the Department of Labor on how the prevailing wage suddenly jumped from $440 per week to $697 is sparse, and may be summarized as simply that DOL has now determined that cooks specializing in foreign foods are SCA-covered occupations. Employer asked the local job service for a copy of the SCA wage determination and supporting documents; the job service referred Employer to the Wage and Hour Division of the Employment Standards Administration. As noted above, Wage and Hour provided a copy of the *1995 OCS survey*, an excerpt from the *SCA Directory of Occupations*, and a letter that indicated that the wage determination was made through slotting. No information was provided, however, indicating whether the 1995 OCS survey was used, which occupations were compared in the slotting process, or why the two occupations were considered to be comparable.[11] Given Wage and Hour's response to Employer's FOIA request, it appears that Wage

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[10]*Amicus* argues that slotting should not be applied in labor certifications because they are used only when survey data does not exist, and slotting therefore imposes an SCA wage on an occupation not listed as a SCA occupation. This argument presumes that a lack of data equates with an occupation not being an SCA-covered occupation. Lack of survey data, however, only establishes that survey data does not exist for a covered occupation – not that the occupation is not covered. The validity of slotting has been affirmed by the ARB, *D.B. Clark III*, ARB No. 98-106 (ARB Sept. 8, 1998), and we are not convinced by *amicus'* contention that slotting is never proper in labor certification cases.

[11]The only apparently matching occupation on the 1995 OCS survey at $697 a week, is a Level III Tax Collector, State and Local Government, low end of middle range. No mean or median wage

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Determination No. 94-2375 was based on the 1995 OCS survey – although Wage and Hour's cover letter certainly is ambiguous about the meaning of the information it supplied to Employer.

Moreover, it is noteworthy that surveys now available covering the time in question provide wage information for cooking related positions. We take administrative notice that the Bureau of Labor Statistics published in October 1997 a Pilot National Compensation Survey ("NCS") for the New York City area in February 1997. At that time, the NCS was beginning development to ultimately replace the OCS. *See National Compensation Survey, Overview* (visited Jan. 11, 2000) <http://www.bls.gov/comover.htm>. Table A-4 from the NCS, shows a mean full-time wage for cooks of $11.10 an hour – almost exactly the wage offered by Employer. This pilot survey did not show a median wage, but later NCS survey information came to essentially similar results. The March 1998 NCS for the NYC area, revised March 1999, for example, shows at Table A-1 for all employers a mean wage for cooks of $10.81 and a median wage of $10.43. Table A-2 of that survey shows a mean wage of $10.66, and a median wage of $10 for private industry. The current OES, which is presumptively used for prevailing wages in non-DBA/SCA occupations for purposes of alien labor certification, *see* General Administration Letter 2-98 and 2-99, and n.5 of this decision, *supra*, shows a mean hourly wage of $10.15 an hour and a median hourly wage of $9.14 for restaurant cooks. *See also* New York State Department of Labor, *Hourly Wage Data from the 1997 OES in New York State* (visited Jan. 11, 2000) <http://www.labor.state.ny.us/html/oeswage/oeswage.asp> (showing wage ranges compiled from the 1997 OES Survey, middle 50% wage range, for Cooks, Restaurant at $6.52 to 12.76).

It is true that these alternative surveys were not available to the CO at the time of the wage determination at issue. Further, this Board has found no rule or policy that would bind the CO to use a particular survey, such as the NCS, to determine the SCA wage for cooks.[12] Nonetheless, the

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[11](...continued)
matches the $697 a week wage determination.

[12]We also take administrative notice that the Preface to the July 1997 NCS for Central New York State (BLS Bulletin 3090-20) expressly states that NCS wage data – which includes wage survey data for cooks – was developed by BLS at the request of ESA for use in administering the SCA. The same is true of the Prefaces for NCS surveys around the same time for Arkansas (BLS Bulletin 3090-26), Dothan, AL (BLS Bulletin 3090-17), West Virginia (BLS Bulletin 3090-21), Nevada (Bulletin 3090-27), and Savannah, GA (BLS Bulletin 3090-19). However, we cannot draw a final conclusion that a policy for using NCS surveys had been established at the time of this wage determination because the NYC NCS bulletin is silent on the use of NCS data for SCA wage determinations, as are the bulletins for most other geographic areas. Moreover, a BLS document entitled "*National Compensation Survey: Questions and Answers*," states:

> [A] government agency, such as the Employment Standards Administration (ESA), may use BLS survey data as a tool in determining the prevailing rate; but the survey results are not automatically "the prevailing rate." The Bureau does not set, nor enforce, prevailing wage rates. At this time, ESA is evaluating the results of NCS tests to

(continued...)

uniformity of the OES and NCS surveys discussed above, including the fact that they are very close to the wage offered by Employer in this case, strongly suggests that the wage determination originally provided by the CO was not reasonably derived.[13]

Finally, we take administrative notice that the OCS -- the survey apparently used in this case -- is no longer maintained, having been replaced entirely by the NCS. *See* Occupational Compensation Survey Homepage (visited on Jan. 11, 2000) <http://www.bls.gov/ocshome.htm> ("We are no longer producing the Occupational Compensation Survey. The National Compensation Survey (NCS) will now be the main source for compensation data."); *Brief: The Occupational Compensation Survey: A Retrospective*, Compensation and Working Conditions Online (Fall 1997, Vol. 2, No. 3) (visited on Jan. 11, 2000) <http://www.bls.gov/opub/cwc/1997/fall/brief1.htm>. We also take administrative notice that the DOT occupational codes are being replaced by classifications used by O*Net, which in turn is designed to be consistent with the 1998 Standard Occupational Classification Revision. *See Report 929* "Revising the Standard Occupational Classification System" (BLS June 1999); *OMB, Notice of Final Decisions, 1998 Standard*

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[12](...continued)
determine how the data can be used in its wage determination process.

See National Compensation Survey: Questions and Answers (visited Jan. 11, 2000) <http://www.bls.gov/special.requests/ocwc/oclt/ncsocs/ncs/ncbr0005.pdf> .

[13]We take administrative notice that in a publication disseminated by the Employment Standards Administration, Wage Hour Division, entitled *Frequently Asked Questions Pertaining to the Issuance of Wage Determinations Under the McNamara-O'Hara Service Contract Act (SCA) of 1965, as Amended*, (visited Jan. 11, 2000) <http://www.dol.gov/dol/esa/public/regs/compliance/whd/web/SCA_FAQ.htm>, ESA states that a janitor and a food service worker (cafeteria worker) would be an appropriate comparison for purposes of slotting:

> **How are wage rates determined for classes that are not surveyed?**
>
> Often, wage surveys result in insufficient data for job classifications. Establishing a prevailing wage rate for these classifications can be accomplished through a "slotting," procedure, utilizing the grading system for Federal employees. Under "slotting," wage rates are derived based on a comparison of equivalent or similar job duties and skills between the classifications which were surveyed and those for which no survey data is available. For example, a surveyed rate for the janitorial classification may be adopted for the food service worker (cafeteria worker) classification because job duties and skills, required for both classifications, are rated at the same grade level under the grading system for Federal employees.

The 1995 OCS survey apparently used for slotting in this case lists two janitorial wage rates, one at Table A5– all establishments, showing a mean hourly wage of $12.32, and a median wage of $13.08. Table A-10 for establishments employing 500 workers or more, shows a mean hourly wage of $12.45 and a median wage of $ 12.71. Although a cafeteria worker presumably would not be paid at the same hourly rate as a restaurant cook, these comparisons further illustrate why, at least on its face, the $17.43 hourly rate applied by the CO appears to be unreasonable.

Occupational Classification, 64 Fed. Reg. 53135 (Sept. 30, 1999). *See also* AILA, "RIR Conversion Cases in the Backlog," *Immigration Law Today* at 30 (January 2000) (criticizing the OES' reduction in the universe of possible occupational designations). In other words, the methodologies for both making wage surveys and for classifying jobs is in a state of flux – moving toward greater consistency – but apparently not yet uniformly implemented.

Based on the record presented, this Board does not have adequate information to determine whether the SCA wage determination made in this case was reasonable or unreasonable.[14] Although everything we have found publicly available concerning the wages of cooks in the New York City area in 1997 indicates that the SCA wage determination may have been inflated, there may be a very good explanation for the wage determination made. The record, however, is devoid of insight into how the determination was made. Although absolute precision in making SCA wage determinations is not required – and this Board will not engage in recalculating wage determinations if reasonably made -- it is unreasonable to expect an employer to meet its burdens in challenging a wage determination if the method of making the determination is clouded in mystery, compounded by the fact that no agency seems to believe that it is responsible for explaining how a determination was made in a labor certification case.

Thus, we remand this case to require the CO to provide employer with a reasonable explanation for the wage determination in 1997. This is simply a matter of fundamental fairness, not to mention the need for rulings that are capable of being reviewed for their legal and factual sufficiency. *See Aleutian Constructors*, WAB Case No. 90-11 (WAB Apr. 1, 1991). In reviewing this matter, the Board became aware of considerable changes since 1997 in the way wage determinations are made and the survey methodologies employed. Thus, the CO may – instead of justifying the 1997 wage determination – find it more expedient to make a revised wage determination for consideration of the employer's reduction in recruitment request.

For the foregoing reasons, the following Order shall issue.

ORDER

The Certifying Officer's denial of labor certification is **HEREBY VACATED** and this matter **REMANDED** for additional proceedings consistent with the foregoing decision.

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[14]During consideration of case, the Board has found it exceedingly difficult to review the reasonableness of the SCA wage determination based on the scant record and the absence of readily available regulatory or policy guidance. *See* Sheinfeld, PREVAILING WAGE DETERMINATIONS UNDER GAL 2-98, 1080 PLI/Corp 9 (AILA 1998) (noting that prior to GAL 2-98, an employer trying to establish a deficiency in SESA survey tested the persistence of advocates, "since it is often difficult to obtain sufficient information about the SESA survey to evaluate its accuracy."). We note, however, that the Bureau of Labor Statistics at www.bls.gov, has easily accessible wage information and is a great source of information, as is the New York State Department of Labor website at www.labor.state.ny.us.

JOHN M. VITTONE
Chair
Board of Alien Labor Certification Appeals

Judge Holmes concurring, with whom Judge Wood joins

I agree with the result reached, as well as the rationale behind the result. Specifically, I strongly agree that "...it is unreasonable to expect an employer to meet its burden in challenging a wage determination if the method of making the determination is clouded in mystery, compounded by the fact that no agency seems to believe that it is responsible for explaining how a determination was made in a labor certification case." (Majority op. at 14). My only major disagreement in the majority's thought process (rationale) is that they appear to have allowed the CO to accept a distorted role for the application of the Davis-Bacon Act and the McNamara-O'Hara Service Contract Act (SCA) in the labor certification process. I am not privy to the reasons behind the Labor Department's use of occupations subject to these Acts being incorporated in the labor certification procedure under Section 656.20(c)(2), nor was any reason given at time of promulgation. (*See* Federal Register, Vol. 42, No. 12, Jan. 18, 1977). However, since the purposes of those Acts are so disparate from labor certification, the only legitimate and acceptable basis is as a reasonable shortcut to obtaining a prevailing wage rate where the method for obtaining same already exists. Thus I would posit that the job category under SCA must be directly related to the job occupation for which labor certification is sought in order for the prevailing rate therein to be applied to labor certification. The Department should not attempt to place a round peg in a square hole. Neither Cook I nor Cook II under the SCA in my view fits the category that Employer has chosen as a description of job duties, *i.e.*, "Cook, Specialty Foreign Foods" set out in the Dictionary of Occupational Titles (D.O.T.). The CO's job, with the assistance of those responsible within the Department of Labor, is to establish a prevailing wage rate under the Act. When challenged by an employer based on a different prevailing wage, the CO must provide a reasonable basis for its findings whether the rate was established based on the SCA or by some other method. This it has failed to do.

I continue to believe the correct view is as I stated for a unanimous panel in *Sofia's Ristorante Italiano*, 1998-INA-238 (May 21, 1999):

> Based upon our review of the duties of Cook II of the Service Contract Act ... with those for the position of Cook, Specialty Foreign Food (D.O.T. 313.361-030), we find that the jobs are not sufficiently comparable for the Job Service to apply the prevailing wage rate set forth in the McNamara-O'Hara Service Contract Act. This panel has taken a position that the change of the job description from Cook, Specialty Foreign Food to Cook II in order to apply the wage rates under the McNamara-O'Hara Service Contract Act as a prevailing wage rate is inappropriate. *Bon Vivant Restaurant*, 1998-INA-295 (April 14, 1999). This is not to say that the CO could not have used another method to establish a prevailing wage above that of Employer's, particularly in light of the sizable difference between the two. Indeed, even as stated by Employer "[t]he primary difference is that Cook II duties, do not involve foreign

> foods"... might suggest a higher prevailing wage than that set out by the CO may be appropriate. Employer, moreover, has not established that his wage rate is correct, but, rather only that the CO's insistence on pegging the prevailing wage rate based on a Cook II description is incorrect.

As a general comment, much of the majority's discussion is in analyzing wages for cooks in the New York area, how surveys developed appropriate prevailing wages, and procedures and studies performed by the Department of Labor. This is just the type of thorough analysis that should be furnished to the CO and used as a basis for a determination of the prevailing wage rate with explanations given to employers who legitimately challenge a DOL determination. While I may have minor differences with the majority's analysis in this area other than to suggest the majority may be going beyond its role as a reviewing authority such differences could be labeled "nitpicking" and are not deserving of further comment.

On the other hand, while there is no direct evidence to so conclude, I feel it appropriate to mention that a possible unspoken basis for the CO's raising from other past cases of the prevailing wage rate to conform to SCA in this and similar cases is that the designation of "cook, specialty, foreign foods" may be an outmoded or inappropriate designation. The "globalization" of the economy tends to blur the lines between authentic foreign specialty cooking and cooking of foreign foods. It can be perceived that an employer may wish to obtain the restrictive 2 year requirement of a "special food, cook", while maintaining the lower prevailing wage rate of a "regular" cook. If this is the issue of concern to the CO in this and similar cases, I believe that it should be addressed in a more direct manner rather than inappropriately categorizing the job opportunity under SCA.